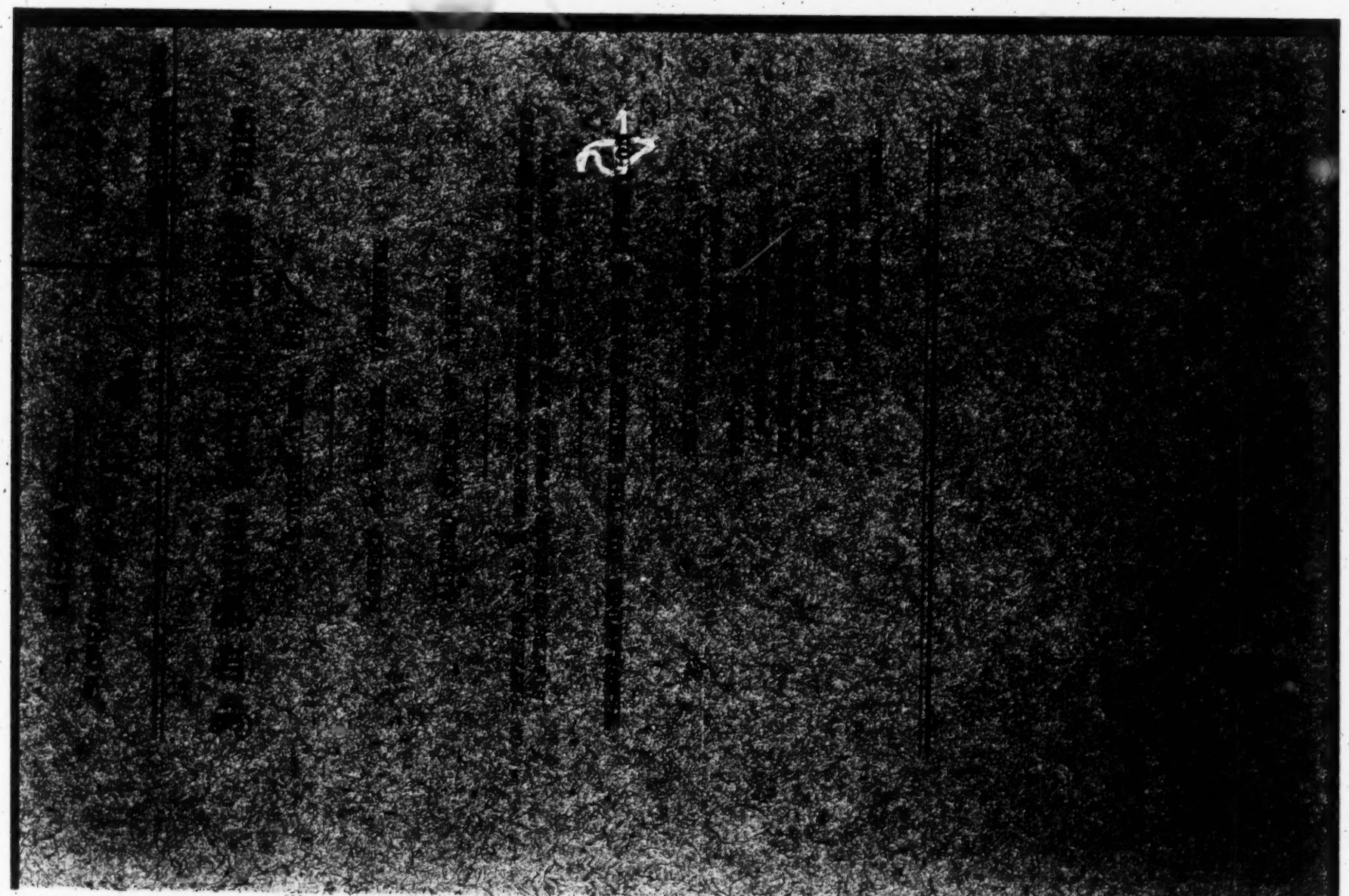
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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 495

ROBERT J. BUTLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On June 3, 1965, petitioner and his co-defendant, John Mayfield, pleaded guilty to two counts charging violations of the wagering tax statute, 26 U.S.C. 7203. Petitioner was sentenced to concurrent terms of imprisonment for one year and fined $2,500 on each count, the fines to run consecutively. The court of appeals affirmed *per curiam*, 361 F. 2d 220.

1. Petitioner and his co-defendant, Mayfield, were first arraigned on June 29, 1964. Through retained counsel they entered pleas of not guilty to three counts of violating the wagering tax statute (R. 204–208). Subsequently, both defendants advised their attorney that they desired to change their pleas.

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Counsel then learned of a meeting that had been held by both defendants with two Internal Revenue Agents, Sawyer and Kelt, out of his presence and without his knowledge. At a hearing on June 3, 1965, defense counsel informed the court of this meeting and suggested that the matters discussed there might taint the pleas which his clients were about to enter (Pet. 4, R. 210).[1] The court decided to re-arraign the defendants, and a thorough examination of both was conducted before their guilty pleas were accepted (Pet. 6–16, R. 212–226).[2] At the close of the hearing, the court asked defense counsel whether he was satisfied with the procedure and had any recommendations. Counsel indicated his satisfaction that all of the pertinent facts had been fully disclosed, and stated, "I don't see how anything more can be done" (Pet. 16, R. 226).

On June 23, 1965, petitioner appeared before the court for sentencing. Although counsel urged the court to place petitioner on probation, the court sentenced petitioner to a fine and imprisonment (R. 229–232). The same day counsel orally moved to set aside the guilty plea, asserting that it had been induced by representations of the two Internal Revenue Agents. On June 24, the court conducted a hearing at which

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[1] The transcript of the hearing has been reprinted in its entirety in the petition, pp. 4–16. "R." refers to the record filed with the Clerk of this Court.

[2] At the re-arraignment hearing, the defendants were asked to plead only to the first two counts (Pet. 9, R. 217). At the subsequent hearing on the sentence, count 3 was dismissed (R. 232).

testimony was elicited from agents Sawyer and Kelt and from both defendants.

The agents stated that on February 23, 1965, petitioner and Mayfield contacted Sawyer by telephone and asked to see him (R. 242). Sawyer arranged to meet both defendants later that evening at the Federal Building in Houston, and invited agent Kelt to be present (R. 242, 264). At the meeting Sawyer asked the defendants why their attorney was not present. Petitioner replied that he and Mayfield were aware of their right to counsel but preferred that their attorney not be present and that the agents not reveal to counsel that this meeting had occurred (R. 243, 279). The defendants then remarked that the case was troubling them and that they desired to plead guilty (R. 243). Sawyer replied that the case was in the hands of a United States Attorney, and that he could not assist them. Petitioner inquired about the sentence. Sawyer stated that the type of sentence is within the sole discretion of the judge, and that the agents do not make recommendations to him (R. 244). Petitioner mentioned the names of two men who he knew had pleaded guilty to similar charges and had received suspended sentences, and asked Sawyer whether such a sentence was possible in his case if he changed his plea. Sawyer told petitioner that each case was different, and cited another wagering tax case where the accused had received a three-year prison term (R. 244). Petitioner then stated that he could not stand a probationary period, but would rather get a stamp and continue his opera-

tion, which he could not do while on probation (R. 244–245).[3]

Petitioner's version of the discussion was that the agents offered to aid him in obtaining a lenient sentence if he changed his plea (R. 291–319). The agents denied that they offered to intercede in any way, or that they led petitioner to believe that as a first offender he would receive a lenient sentence upon a plea of guilty (R. 246–247, 255, 256, 268, 272–279). Co-defendant Mayfield corroborated the agents' testimony (R. 264–289), and told the court that he had indicated to petitioner that he disliked "this business of claiming that these agents had made some promise to you," because the claim had no substance (R. 280–281). At the conclusion of this testimony the court denied petitioner's motion (R. 328).

Petitioner's claim that his guilty plea was based upon inducements by special agents of the Internal Revenue Service is founded exclusively upon his own interpretation of the testimony at the post-sentencing hearing. The facts as found by the courts below with ample support in the record show clearly that petitioner's claim is groundless. See *Koolish* v. *United States*, 340 F. 2d 513 (C.A. 8), certiorari denied, 381 U.S. 951; *Mount* v. *United States*, 333 F. 2d 39 (C.A. 5), certiorari denied, 379 U.S. 900.

2. Two weeks after the court imposed sentence and denied petitioner's motions to set aside the guilty plea

[3] After his first arraignment, petitioner purchased a tax stamp and to the time of trial continued to pursue his bookmaking occupation (R. 252).

or to reduce the sentence, petitioner submitted to the court a motion to inspect and examine the reports of the probation department (R. 350). This motion was denied (R. 353). Petitioner contends that, although the denial was consistent with this Court's decision in *Williams* v. *New York,* 337 U.S. 241, due process requires a re-examination of the principles enunciated there. However, the reasoning of the Court in *Williams*—that in deciding upon the proper sentence the court may look to any source it deems reliable—is as valid today as when it was first announced. There is no sound reason for denying the sentencing court access to confidential materials not a matter of public record, and broad discretion to determine whether the material received in confidence should be disclosed. See *Williams* v. *Oklahoma,* 358 U.S. 576; *Powers* v. *United States,* 325 F. 2d 666 (C.A. 1); *United States* v. *Durham,* 181 F. Supp. 503 (D.D.C.), certiorari denied, 364 U.S. 854.[4]

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[4] Rule 32(c)(2) of the amended Rules of Criminal Procedure, effective July 1, 1966, is consistent with *Williams.* It provides:

> (c) Presentence investigation—
>
> (2) Report. * * * The court before imposing sentence *may* disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity *to* the defendant or his counsel to comment thereon. * * * [Emphasis added.]

Dillon v. *United States,* 307 F. 2d 445 (C.A. 9), relied on by petitioner, holds only that when the district court orders a hearing under 28 U.S.C. 2255 to determine whether an indigent's guilty plea was induced by prosecutor misrepresentations, the court should grant a request for appointment of counsel. In that case, it appeared that the government attorney had promised the defendant that, if asked, he would recommend to the judge, and suggest in the presentence report, that a maximum sentence of ten

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

SEPTEMBER 1966.

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years' imprisonment be imposed. The court of appeals held that it was relevant to inquire as to how often judges and probation officers obtain specific recommendations from the United States Attorney's office, whether such recommendations are customarily included in presentence reports, and whether one was included in defendant's report. The court held that the defendant, without the benefit of counsel, could not effectively pursue this issue at the hearing.

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